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IN THE

Supreme Court of the United States

October Term, 1961.

No. 734.

DELAWARE VALLEY MARINE SUPPLY COMPANY,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY; PHILIP MORRIS, INCORPORATED; LIGGETT & MYERS TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; P. LORILLARD COMPANY; LIPSCHUTZ BROS., INC.; JANIS LIPSCHUTZ, Executrix of the Estate of Albert Lipschutz, Deceased; JANIS LIPSCHUTZ; MORTON LIPSCHUTZ; MAE LIPSCHUTZ,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

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QUESTION PRESENTED.

Is there any reasonable basis for inferring, in the absence of any direct evidence, that several manufacturers, each of whom may have been aware of the action taken by the others,[1] acted pursuant to a conspiracy when each of them rejected the request for a distributorship of a newly-formed enterprise which did not present the experience, resources, or other attributes of a potentially successful distributor and neither the particular business setting nor any other circumstance indicated that the manufacturers' rejections were made other than in the exercise of their own independent business judgments?

STATEMENT OF THE CASE.

This antitrust action for treble damages, predicated on the theory that the tobacco manufacturer respondents refused to deal with petitioner as the result of a conspiracy in which the Lipschutz respondents [2] participated, was insti-

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1. The court below concluded that there was "some evidence" to support an inference that "the tobacco companies were aware of the action taken by each of the others" (Appendix A, p. 10a). On this premise the Petition presents only the question of what further inference may be drawn from consciously uniform business behavior, i.e., the several refusals to deal. If *certiorari* were granted respondents would question, as they did below, whether there was any refusal to deal on the part of Lorillard and R. J. Reynolds, whether there was evidence of consciously uniform business behavior by the tobacco manufacturers, and whether there was any evidence to show participation by the Lipschutz respondents in the alleged conspiracy. In addition, respondents would raise the question (not reached in the court below, but ruled in respondents' favor by the trial court) whether the judgment should be affirmed because petitioner failed to prove it was damaged.

2. The complaint named Lipschutz Bros., Inc., Albert Lipschutz, Janis Lipschutz, Morton Lipschutz and Mae Lipschutz. Albert Lipschutz died just before trial and his executrix was substituted. The case was dismissed, during trial, as to Janis and Mae Lipschutz and petitioner did not challenge that dismissal in the court of appeals.

tuted in July of 1957. Petitioner had obtained a Pennsylvania Certificate of Incorporation in March of 1956, but it never actually engaged in business. Following incorporation it procured Federal and Pennsylvania licenses to make tax-free sales of bonded tobacco and liquor to ships engaged in foreign trade[3] and claimed to have obtained an oral lease of office and warehouse space (66b); but the only funds it ever possessed were $500 and it never issued any stock, paid any rent, installed any furniture or equipment, or employed any personnel (179b; Ex. R-3, 737b; 66b; 71b; 56a, 84b).

Petitioner's promoters and prospective stockholders[4] were two partners in a Philadelphia law firm, two Deputy United States Marshals and a school teacher, none of whom had ever had any experience in the business for which petitioner was incorporated and licensed (4b-5b; 77b, 184b). Early in 1956, prior to incorporation, one of the Philadelphia lawyers inquired, separately, of the local representatives of Reynolds and of Philip Morris whether each of their companies would supply bonded tobacco products; each replied in the negative (34a-40a). Following incorporation, one of the Deputy Marshals visited the New York office of Liggett & Myers where he was advised that it was adequately represented in the port of Philadelphia (155b-157b). Later the same day he called on Philip Morris and was told that it would investigate (157b-158b). These were petitioner's only personal contacts with respondents during all of 1956.

In July of 1956, the lawyer-promoter, using the letterhead of his law firm, wrote identical letters to Liggett &

3. The sale of these and other supplies to ships engaged in foreign trade, for resale to crew members, is commonly referred to as the sea stores business.

4. No share certificates were ever issued (40b). It was planned that the shares of the United States Marshals if and when issued, would be held by their wives since ". . . it would be better that [their wives] be the stockholders because of their positions with the Federal Government" (41b).

Myers, American, and Philip Morris requesting their products for his "client" (Exs. P-12, 700b; P-19, 705b; P-31, 713b). In August he sent to each of them a registered mail follow-up and, in due course, each of them declined petitioner's request[5] (Exs. P-14, 702b; P-20, 706b; P-32, 714b; P-15, 703b; P-21, 707b; P-33, 715b).

Thereafter, petitioner's only efforts to obtain cigarettes from any tobacco manufacturer, as shown by the evidence, occurred in 1957 at a series of meetings with representatives of Philip Morris (41a-46a). Petitioner's position was that to be successful it needed all brands of cigarettes and did not wish to handle only Philip Morris products (123b-124b, 161b), yet petitioner had ceased its efforts to secure the products of other manufacturers.

Undisputed evidence in petitioner's case showed the history of the sea stores tobacco business in Philadelphia, which was the setting for the business decisions of the several respondents. For many years Liggett & Myers, American and Philip Morris had dealt with respondent, Lipschutz Bros., as their sea stores distributor in the port of Philadelphia (204b, 250b, 256b, 258b). Reynolds and Lorillard had also dealt with Lipschultz but, prior to the formation of petitioner, they had, in addition, begun to sell to another distributor (80b; Exs. P-56A, 720b; P-79, 727b). Several other distributors had dropped out of the business prior to World War II (218b-219b). A sea stores outlet which started in 1948 and acted as a distributor for some of the respondents went into bankruptcy in 1951 (206b). Respondent manufacturers' sales of sea stores tobacco in the port of Philadelphia in 1956 (the year of

5. Although petitioner's evidence was that in July and again in August he had similarly sent such letters to Reynolds and Lorrillard, petitioner was unable to produce copies of any letters either to Reynolds or to Lorillard and respondents' evidence, including the records of the United States Post Office concerning registered mail letters in August, showed that no such letters were sent or received (321b, 326b-328b; 386b; 424b-426b, 651b; 653b-654b; 656b; Ex. R-15, 764b).

petitioner's applications) had increased over 1955 as follows (249b, 252b, 255b-258b, 262b):

Philip Morris (one outlet)	48.3%
American (one outlet)	25.0%
Liggett & Myers (one outlet)	25.0%
Reynolds (two outlets)	13.7%
Lorillard (two outlets)	11.3%

There was no showing why, in the face of such marked growth, any manufacturer needed another outlet—particularly one so inexperienced as petitioner.

After a 22-day trial the jury disagreed,[6] and the trial court subsequently granted respondents' motions for judgment under F. R. C. P. 50(b). At the argument petitioner had conceded that if there was no evidence to sustain a damage verdict there was no basis for injunctive relief and its case must fall. Accordingly the trial court, finding no evidence from which a jury could reasonably infer that petitioner had been damaged, declined to state any view on the sufficiency of the evidence to prove a conspiracy. The Court of Appeals for the Third Circuit affirmed, unanimously, holding that petitioner had failed to make out a *prima facie* case of conspiracy.[7]

6. The jury was unable to agree on the answer to the first of seven interrogatories submitted to it, which asked: "Did plaintiff have such business or property as to entitle it to maintain this action?" It was therefore discharged without reaching the subsequent interrogatories relating to conspiracy and damage.

7. The decision of the Court of Appeals is reported at 297 F. 2d 199.

ARGUMENT.

Having failed to satisfy either the jury or the courts below on the essential elements of its case[8] petitioner asserts that this Court should exercise its discretionary certiorari jurisdiction because the decision of the court of appeals conflicts with decisions of this Court and of other courts of appeals. There is no conflict. Petitioner would create conflict by attributing to the opinion below a meaning and a significance which it does not have. The court below held merely that, on the peculiar facts of this case, the circumstantial evidence did not reasonably support an inference of conspiracy. Petitioner attempts to convert that decision into a sweeping declaration of principles which, it says, places an "almost insurmountable obstacle" in the path of an antitrust plaintiff, and makes it "well nigh impossible to prove a *prima facie* case of conspiracy" (Petition, p. 13).

These consequences are said to follow from Chief Judge Biggs' discussion of the significance of consciously uniform business behavior (conscious parallelism) in the circumstances of this case. But petitioner fails to recognize that "conscious parallelism" is nothing more than a convenient label often used to describe a type of circumstantial evidence. "Its probative value in establishing the ultimate fact of conspiracy will vary case by case . . . depending on the particular business setting in which it occurs." *Att'y. Gen. Nat'l Comm. Antitrust Rep.* 39, 40.[9]

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8. The jury was not persuaded that petitioner had standing to sue, the trial court held petitioner had not proved damage, and the court of appeals held that petitioner had failed to make out a *prima facie* case of conspiracy.

9. See, to the same effect, Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 *Harv. L. Rev.* 655, 658 (1962) where the author states:

> "The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts."

Such circumstantial evidence may range from limited parallelism, such as the several refusals to deal here involved,[10] to elaborate and pervasive uniformity in a context where the reasonable expectation would be non-uniformity. It may appear in conjunction with other evidence suggestive of conspiracy or, as in this case, may stand alone in a record barren of any circumstances indicative of a conspiracy. Both the nature of the parallel conduct and its business setting must be considered in determining what, if any, inferences may be drawn from it.

Chief Judge Biggs evaluated, in its particular business setting, the probative significance of the limited parallelism here. He concluded that ". . . in this case consciously uniform business behavior of the kind shown, standing alone, is not enough to sustain a finding of conspiracy" (Appendix A, p. 10a). Moreover, his careful review of the evidence demonstrates that there were ". . . no additional circumstances which would tend to cast suspicion on the defendants' rejections of the plaintiff's applications as an exercise of independent judgment" (Appendix A, p. 11a).

The holding below is in no sense contrary to or in conflict with this Court's decision in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537

10. The Petition implies (p. 4) that respondents' argument in the court of appeals was limited to the contention that "conscious parallelism" was not present in this case. This implication conflicts with the facts. In their Brief in the court of appeals, respondents' discussion of conscious parallelism began as follows:

> "Plaintiff has relied upon the concept of 'conscious parallelism' in support of its position that there was sufficient circumstantial evidence to warrant submission of this issue to the jury. But the cryptic words 'conscious parallelism' have no substantive significance. When properly used, they constitute merely a shorthand reference to a particular kind of circumstantial evidence, and as such do not present a unique problem. The evidence must still be analyzed to determine whether it fairly gives rise to a reasonable and logical inference of conspiracy. If it does not, plaintiff's case should not go to the jury."

(1954). There plaintiff showed that defendants uniformly refused plaintiff's request to obtain first-run pictures and adhered to an established policy of restricting the distribution of first-run pictures. Moreover, by introducing the decree in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), plaintiff had shown defendants' earlier participation in a broad national conspiracy. This Court affirmed a judgment for defendants and held only that plaintiff's evidence did not require a directed verdict in plaintiff's favor.

Similarly, the decision below is not in conflict with *Nagler v. Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957) and *Bordonaro Bros. v. Paramount*, 176 F. 2d 594 (2d Cir. 1949). *Nagler* concerned the sufficiency, at the pleading stage, of a complaint charging consciously parallel conduct and thus did not involve determination of whether such conduct, evaluated in the light of its business setting as shown by evidence adduced at a trial, was sufficient circumstantial evidence to support an inference of conspiracy.[11] *Bordonaro*, as Chief Judge Biggs noted, presented a factual situation in "striking contrast" to the factual situation here (Appendix A, pp. 10a-11a). That contrast is apparent even from petitioner's brief description of the *Bordonaro* facts (Petition, p. 9); further, the *Paramount* decree was also in evidence in that case.

The claimed conflict with *Standard Oil Co. v. Moore*, 251 F. 2d 188 (9th Cir. 1958) and *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (9th Cir. 1957) is equally illusory. In those cases, as here, the court evaluated the probative significance of the evidence. There the court concluded that an inference of conspiracy was permissible although, on other grounds, judgments for plaintiff were reversed. But the inference was supported, in those cases, by evidence highly

11. *Hathaway Motors v. General Motors Corporation*, 18 F. R. L. 283 (D. Conn. 1955), cited in *Nagler* and referred to in the Petition (page 9, n. 9), is simply another case decided at the pleading stage.

suggestive of conspiracy and vastly different from the evidence here.

The decisions which petitioner cites from the Courts of Appeals for the Fourth and Fifth Circuits likewise present no conflict with the decision below. In *Paramount Film Distributing Corp. v. Applebaum*, 217 F. 2d 101 (5th Cir. 1954), another case involving the motion picture industry, judgment was entered for one defendant because its refusal to deal, viewed in its business setting, did not reasonably lead to the inference that it had conspired with other defendants who had also refused to deal with plaintiff. Since a new trial was granted as to the other defendants, the court did not comment in any detail on the conscious parallelism and "other activities" which it regarded as sufficient to warrant an inference of conspiracy against them. *Pittsburgh Plate Glass Co. v. United States*, 260 F. 2d 397 (4th Cir. 1958) [12] involved both an actual agreement to fix prices and PPG's knowledge of and action in conformity with that agreement.

The cases cited by petitioner simply differ from this case on their facts, or are not in point. As the court below made clear, it had no intention to and did not depart from its own earlier decisions where, in different factual settings, it held consciously parallel business behavior to be a significant link in the chain of circumstantial evidence proving a conspiracy. *Wm. Goldman Theatres, Inc. v. Loews, Inc.*, 150 F. 2d 738 (3d Cir. 1945), *cert. denied*, 334 U. S. 811 (1948); *Ball v. Paramount Pictures, Inc.*, 169 F. 2d 317 (3d Cir. 1948), *cert. denied*, 339 U. S. 911 (1950); *Milgram v. Loews, Inc.*, 192 F. 2d 579 (3d Cir. 1951), *cert. denied*, 343 U. S. 929 (1952).

The unanimous opinion of the court below announces no new legal theories. Review by this Court would serve no purpose other than to provide petitioner with still an-

12. This Court, in affirming [360 U. S. 395 (1959)], dealt only with the availability of grand jury testimony.

other forum to scrutinize the extensive evidence and determine what inferences were reasonably permissible under the peculiar and particular facts of this case. Accordingly the petition should be denied.

Respectfully submitted,

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